

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JACOB ANTHONY,  
Plaintiff,  
v.  
CORPORAL ESTHER SCHACKMANN,  
CORPORAL KENNETH STEPP,  
Defendants.

No. CV-07-698-HU

FINDINGS & RECOMMENDATION

Jacob Anthony  
10146552  
Two Rivers Correctional Institution  
Umatilla, Oregon 97882

Plaintiff Pro se

Hardy Myers  
ATTORNEY GENERAL  
Leonard W. Williamson  
ATTORNEY-IN-CHARGE  
Department of Justice  
1162 Court Street NE  
Salem, Oregon 97301-4096

Attorney for Defendants

HUBEL, Magistrate Judge:

Pro se plaintiff Jacob Anthony, an inmate at Two Rivers  
Correctional Institution, brings this 42 U.S.C. § 1983 action

1 - FINDINGS & RECOMMENDATION

1 against defendants Corporal Esther Schackmann and Corporal Kenneth  
2 Stepp. Plaintiff brings claims under the Eighth Amendment, First  
3 Amendment, and Fourteenth Amendment, arising out of an incident in  
4 November 2005 between plaintiff and Schackmann which occurred at  
5 the Oregon State Penitentiary (OSP).

6 Defendants move for summary judgment on all claims. I  
7 recommend that the motion be granted.

#### 8 BACKGROUND

9 Plaintiff, an inmate in the custody of the Oregon Department  
10 of Corrections (ODOC), was housed at OSP during the time the events  
11 at issue took place. Schackmann and Stepp are employed as  
12 Corporals at OSP and were so employed at all times alleged in the  
13 Complaint.

14 The parties agree that on November 25, 2005, Schackmann and  
15 plaintiff were working in the dining room at OSP. The parties  
16 further agree that plaintiff requested a pair of rubber gloves from  
17 Schackmann and that she told plaintiff she had none.

18 At this point, Schackmann contends that plaintiff followed her  
19 around the dining hall, repeatedly asking for a pair of rubber  
20 gloves. Schackmann Affid. at ¶ 3. She allegedly told plaintiff to  
21 go away. Id. at ¶ 4. Schackmann states that instead of leaving  
22 her alone, plaintiff forcefully reached across her body and grabbed  
23 for her waist at pocket level. Id. She instinctively raised her  
24 arm to deflect plaintiff's hand and arm away from her body. Id.  
25 In doing so, she inadvertently struck plaintiff's head with her  
26 open hand. Id.

27 Plaintiff left the dining room to return to his cell. Id. at  
28 ¶ 5. Schackmann reported the events to Captain Andrews, the

1 officer-in-charge at the time. Id. at ¶ 6. Plaintiff was  
2 subsequently taken to the Disciplinary Segregation Unit (DSU),  
3 without incident. Id.

4 Both a misconduct and unusual incident report were completed  
5 regarding the incident. Attmts 1 & 2 to Schackmann Affid. The  
6 misconduct report recites the facts according to Schackmann's  
7 version of the incident. Attmt 1 to Schackmann Affid. It also  
8 cites plaintiff with three separate disciplinary violations:  
9 Attempted Assault I, Disrespect, and Disobedience of an Order I.  
10 Id. Both Schackmann and Andrews signed the misconduct report. Id.

11 The unusual incident report notes an attempted staff assault  
12 by plaintiff with a reactive physical force used by Schackmann.  
13 Attmt 2 to Schackmann Affid. It also recites the facts according  
14 to Schackmann's version of the incident. Id. It is signed by  
15 Andrews. Id.

16 Plaintiff agrees that he requested gloves from Schackmann, as  
17 he had done on numerous previous occasions. Pltf Affid. at ¶ 5.  
18 He contends that Schackmann responded that she had none in the  
19 closet. Id. at ¶ 6. Plaintiff states that he then asked if she  
20 had an extra in her pants leg pocket, as he had also done on past  
21 occasions. Id. at ¶ 7. While asking, he pointed to Schackmann's  
22 right leg pants pocket with his right index finger while standing  
23 directly in front of her, which he had been doing for the entire  
24 conversation they had been having. Id. at ¶ 8. At this point,  
25 plaintiff alleges that Schackmann unexpectedly slapped him in the  
26 left temple with her open and unimpeded right hand. Id. Plaintiff  
27 stepped back and told Schackmann never to put her hands on him.  
28 Id.

3 - FINDINGS & RECOMMENDATION

1 Plaintiff contends that he complained to Corporal Flemming who  
2 was apparently standing nearby. Id. at ¶¶ 11, 13. He also  
3 approached Sergeant Alvis in the dining hall and complained about  
4 being slapped by Schackmann without provocation. Id. at ¶ 14.

5 On the date of the incident, plaintiff completed a medical  
6 appointment form, complaining of a "tension headache" after having  
7 been slapped by Schackmann. Exh. F to Pltf Opp. Mem. at p. 1.  
8 The written response stated that the sick call nurse would see  
9 plaintiff the following week and if need be, the doctor would also  
10 see plaintiff the following week. Id. The written response also  
11 states that plaintiff should take 800 milligrams of ibuprofen,  
12 three to four times per day, or Tylenol, before seeing the doctor.  
13 Id. The signature is illegible and the response is dated November  
14 26, 2005, the day after the request. Id.

15 On December 5, 2005, plaintiff completed a grievance form in  
16 which he stated that he was "not seen by medical after being  
17 intentionally slapped" by Schackmann. Id. at p. 2. However, in  
18 the section where he is asked to list any actions he had already  
19 taken to resolve the grievance, he states that he spoke to the sick  
20 call nurse and sent a kyte, and that he also requested to speak to  
21 "psyche." Id.

22 Plaintiff's medical progress notes from the time period show  
23 a "no show" for the "MD clinic" on November 30, 2005. Defts' Exh.  
24 102. The progress notes contain no record of later complaints of  
25 headache. Id.

26 An investigation of the incident was conducted by Inspector  
27 Elwood L. Fogleman of the ODOC Investigations Unit. Attmt 3 to  
28 Schackmann Affid. Fogleman interviewed plaintiff, Schackmann, and

1 at least three other inmates and three other ODOC employees. Exh.  
 2 A to Pltf Opp. Mem. He forwarded his report to Hearings Officer  
 3 Coleen Clemente for disposition. Attmt 3 to Schackmann Affid. at  
 4 p. 3.

5 A hearing was held on January 9, 2005. Attmt 4 to Schackmann  
 6 Affid. All three misconduct charges against plaintiff were  
 7 dismissed due to insufficient evidence. Id. Plaintiff was  
 8 apparently released from DSU at that point.

#### 9 STANDARDS

10 Summary judgment is appropriate if there is no genuine issue  
 11 of material fact and the moving party is entitled to judgment as a  
 12 matter of law. Fed. R. Civ. P. 56©. The moving party bears the  
 13 initial responsibility of informing the court of the basis of its  
 14 motion, and identifying those portions of "'pleadings, depositions,  
 15 answers to interrogatories, and admissions on file, together with  
 16 the affidavits, if any,' which it believes demonstrate the absence  
 17 of a genuine issue of material fact." Celotex Corp. v. Catrett,  
 18 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56©).

19 "If the moving party meets its initial burden of showing 'the  
 20 absence of a material and triable issue of fact,' 'the burden then  
 21 moves to the opposing party, who must present significant probative  
 22 evidence tending to support its claim or defense.'" Intel Corp. v.  
 23 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)  
 24 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th  
 25 Cir. 1987)). The nonmoving party must go beyond the pleadings and  
 26 designate facts showing an issue for trial. Celotex, 477 U.S. at  
 27 322-23.

28 The substantive law governing a claim determines whether a

1 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors  
2 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as  
3 to the existence of a genuine issue of fact must be resolved  
4 against the moving party. Matsushita Elec. Indus. Co. v. Zenith  
5 Radio, 475 U.S. 574, 587 (1986). The court should view inferences  
6 drawn from the facts in the light most favorable to the nonmoving  
7 party. T.W. Elec. Serv., 809 F.2d at 630-31.

8 If the factual context makes the nonmoving party's claim as to  
9 the existence of a material issue of fact implausible, that party  
10 must come forward with more persuasive evidence to support his  
11 claim than would otherwise be necessary. Id.; In re Agricultural  
12 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);  
13 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,  
14 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

#### 15 DISCUSSION

16 Plaintiff claims that Schackmann's slap violated the Eighth  
17 Amendment. He further claims that, in violation of the First  
18 Amendment, he was placed in the DSU in retaliation for complaining  
19 about the incident to Flemming and Alvis. Finally, he contends  
20 that his placement in the DSU violated the Due Process Clause of  
21 the Fourteenth Amendment. I address the claims in turn.

#### 22 I. Eighth Amendment

23 For the purposes of this motion, I assume the facts in  
24 plaintiff's favor. Accordingly, I assume that Schackmann's slap to  
25 plaintiff's head was unprovoked and was not, as Schackmann states,  
26 a reflexive reaction to plaintiff's attempts to physically touch  
27 her.

28 "[W]henever prison officials stand accused of using excessive

1 physical force in violation of the Cruel and Unusual Punishment  
2 Clause, the core judicial inquiry is . . . whether force was  
3 applied in a good faith effort to maintain or restore discipline,  
4 or maliciously and sadistically to cause harm." Hudson v.  
5 McMillian, 503 U.S. 1, 6-7 (1992); see also Whitley v. Albers, 475  
6 U.S. 312 (1986).

7 It is widely accepted that not "every malevolent touch by a  
8 prison guard gives rise to a federal cause of action." Hudson, 503  
9 U.S. at 9 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.  
10 1973) ("Not every push or shove, even if it may later seem  
11 unnecessary in the peace of a judge's chambers, violates a  
12 prisoner's constitutional rights.")). "The Eighth Amendment's  
13 prohibition of cruel and unusual punishments necessarily excludes  
14 from constitutional recognition de minimis uses of physical force,  
15 provided that the use of force is not of a sort repugnant to the  
16 conscience of mankind." Hudson, 503 U.S. at 9-10 (internal  
17 quotations omitted).

18 Eighth Amendment cases from courts across the country have  
19 usually held that a single incident typically is insufficient to  
20 support an Eighth Amendment claim. For example, in Swift v.  
21 Iramina, No. 08-00100 JMS-KSC, 2008 WL 1912470, at \*3 (D. Haw. Apr.  
22 29, 2008), the court dismissed a claim by a prisoner against a  
23 guard who allegedly pushed him in response to a question by  
24 plaintiff. Similarly, in Meza v. Director of California Department  
25 of Corrections, No. 1:05-CV-01180-OWW-LJO-P, 2006 WL 1328220, at \*3  
26 (E.D. Cal. May 15, 2006), the court dismissed allegations that a  
27 prison guard allegedly slammed the plaintiff's head into a wall,  
28 resulting in a bruise, as insufficient to state an Eighth Amendment

1 claim.

2 As the Meza court noted, the Ninth Circuit recognizes that in  
3 an Eighth Amendment claim, the inquiry focuses on the use of force,  
4 not the nature of the injury. Meza, 2006 WL 1328200, at \*3 (citing  
5 Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002) for the  
6 proposition that "Eighth Amendment excessive force standard  
7 examines de minimis uses of force, not de minimis injuries"). The  
8 court in Oliver explained that the more well reasoned cases reject  
9 an interpretation of Hudson which requires a de minimis injury  
10 requirement. Oliver, 289 F.3d at 628. Rather, the Ninth Circuit  
11 explained, the Hudson Court held that "'de minimis uses of physical  
12 force' are not constitutional violations, focusing on the amount of  
13 force used, not the nature or severity of the injury inflicted."  
14 Id.

15 Here, I agree with defendants that, as a matter of law,  
16 Schackmann's single open-handed blow to plaintiff's temple during  
17 a single incident is a de minimis use of force, incapable of  
18 supporting plaintiff's Eighth Amendment claim. See, e.g., Norman  
19 v. Taylor, 25 F.3d 1259, 1262-64 (4th Cir. 1994) (keys swung at  
20 inmate's face which struck his thumb was de minimis force); White  
21 v. Holmes, 21 F.3d 277, 280-81 (8th Cir. 1994) (keys swung at  
22 inmate which slashed his ear was de minimis force); Black Spotted  
23 Horse v. Else, 767 F.2d 516, 517 (8th Cir. 1985) (corrections  
24 officer's pushing a cubicle wall so as to strike plaintiff's legs,  
25 brusque order to inmate, and poking inmate in the back was de  
26 minimis force); Roberts v. Samardvich, 909 F. Supp. 594, 604 (N.D.  
27 Ind. 1995) (grabbing inmate, pushing him up the stairs toward his  
28 cell, and placing him in cell cuffed, shackled, and secured to the



1 door was de minimis force under the circumstances); Crow v. Leach,  
2 No. C 93-20199 WAI, 1995 WL 456357, at \*2-3 (N.D. Cal. July 28,  
3 1995) (corrections officer's pushing inmate into chair causing his  
4 shoulder to break window behind him was de minimis force); Jackson  
5 v. Hurley, No. C 91-2170 BAC, 1993 WL 515688, at \*2 (N.D. Cal. Nov.  
6 23, 1993) (blow to back of neck with forearm and kick to the ankle  
7 of inmate were de minimis force); Olson v. Coleman, 804 F. Supp.  
8 148, 150 (D. Kan. 1992) (single blow to head of handcuffed inmate  
9 was de minimis force); Neal v. Miller, 778 F. Supp. 378, 384 (W.D.  
10 Mich. 1991) (backhand blow with fist to the groin of inmate was de  
11 minimis force).

12 I recommend that defendants' motion for summary judgment on  
13 the Eighth Amendment claim, be granted.

## 14 II. First Amendment

15 Defendants' argument against plaintiff's First Amendment claim  
16 is noticeably off the mark. In their opening memorandum in support  
17 of their motion, defendants state that plaintiff's First Amendment  
18 claim should be dismissed because there was no attempt to silence  
19 him. Defts' Mem. at p. 9. According to defendants, "[plaintiff]  
20 was able to say whatever he wanted to the hearings officer and the  
21 investigator assigned to investigate his side of the events. In  
22 the end the disciplinary system worked to his advantage and the  
23 charges against him were dismissed." Id.

24 The problem here is that plaintiff's First Amendment claim is  
25 not grounded in a deprivation of the opportunity to speak once he  
26 was confined to DSU. Rather, it is a classic retaliation claim in  
27 which he contends that in retaliation for the exercise of his First  
28 Amendment right to complain to Flemming and Alvis about the slap

1 from Schackmann, he was transferred to DSU.

2 The assertion of a viable First Amendment retaliation claim  
3 requires five elements: (1) an assertion that a state actor took  
4 some adverse action against an inmate (2) because of (3) that  
5 inmate's protected conduct, and that such action (4) chilled the  
6 inmate's exercise of his First Amendment rights, and (5) the action  
7 did not reasonably advance a legitimate correctional goal. Rhodes  
8 v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

9 While defendants fail to put forth an argument on each of  
10 these elements, my review of the record indicates that defendants  
11 are nonetheless entitled to summary judgment based on the first  
12 element articulated in Rhodes. Plaintiff names only Schackmann and  
13 Stepp as defendants. The record fails to support that either of  
14 them were responsible for plaintiff's transfer to DSU. Rather, the  
15 misconduct report shows that Andrews is the state actor who  
16 initiated the transfer which is the alleged retaliatory act.

17 In a section entitled "Placed in Holding Status," which  
18 appears at the end of the misconduct report, the following appears:

19 As officer-in-charge, I have reviewed the foregoing  
20 Report of Misconduct and find that the rule violation(s)  
21 is/are of such a serious nature that the good order and  
22 security of the facility require immediate removal of the  
23 inmate and placement in segregation status because: This  
inmate engaged in an activity that challenges the rules  
of the institution. He is placed in Segregation for  
restricted confinement, because he is a direct threat to  
staff and inmates.

24 Attmt 1 to Schackmann Affid. This is followed by the printed name  
25 and signature of Andrews, who is identified as the person having  
26 placed plaintiff in segregation. Id.

27 To state a civil rights claim against an individual defendant,  
28 plaintiff must allege facts showing a defendant's "personal

1 involvement" in the alleged constitutional deprivation or a "causal  
2 connection" between a defendant's wrongful conduct and the alleged  
3 constitutional deprivation. Barren v. Harrington, 152 F.3d 1193,  
4 1194 (9th Cir. 1998); Hansen v. Black, 885 F.2d 642, 646 (9th Cir.  
5 1989). Here, plaintiff fails to allege that either of the  
6 named defendants had a personal involvement in the decision to  
7 transfer plaintiff to DSU. He fails to show that either of the  
8 named defendants has any causal connection to the alleged  
9 constitutional deprivation at issue in the First Amendment claim.  
10 His failure to name Andrews as a defendant is fatal to the claim.

11 I recommend that defendants' motion for summary judgment as to  
12 the First Amendment claim, be granted.

### 13 III. Due Process - Fourteenth Amendment

14 Finally, as to the Due Process claim, plaintiff contends that  
15 his allegedly unfounded placement in DSU violated his Fourteenth  
16 Amendment right to due process of law. I agree with defendants  
17 that plaintiff cannot sustain this claim.

18 In Sandin v. Conner, the Supreme Court rejected plaintiff's  
19 position that "any state action taken for a punitive reason  
20 encroaches upon a liberty interest under the Due Process Clause  
21 even in the absence of any state regulation." Sandin v. Conner,  
22 515 U.S. 472, 484 (1995). While "prisoners do not shed all  
23 constitutional rights at the prison gate," state-created liberty  
24 interests protected by the Due Process Clause and arising in the  
25 prison context, "will be generally limited to freedom from  
26 restraint which . . . imposes atypical and significant hardship on  
27 the inmate in relation to the ordinary incidents of prison life."  
28 Id. at 484, 485 (citations omitted).

1       Following this standard, the Court concluded that the case  
2 before it, where the plaintiff had been placed in disciplinary  
3 segregation for thirty days, "though concededly punitive," "did not  
4 present the type of atypical, significant deprivation in which a  
5 State might conceivably create a liberty interest." Id. at 486.

6       Moreover, plaintiff here received all of the "process" he was  
7 constitutionally due. Wolff v. McDonnell, 418 U.S. 539, 563-72  
8 (1974) outlines the basic due process guarantees required in the  
9 prison disciplinary context. As the Ninth Circuit summarized in a  
10 1994 case, Wolff prescribes five key procedural requirements: (1)  
11 written notice of the charges; (2) a brief period of time given to  
12 the inmate to prepare for an appearance before a committee or  
13 hearing; (3) written statement by the factfinders as to the  
14 evidence relied on and the reasons for the disciplinary action; (4)  
15 the ability of the inmate to call witnesses and present documentary  
16 evidence; and (5) if the inmate is illiterate or unable to collect  
17 and present evidence necessary for an adequate comprehension of the  
18 case, the provision to the inmate of a fellow inmate as an aide or  
19 a substitute staff aide. Walker v. Sumner, 14 F.3d 1415, 1420 (9<sup>th</sup>  
20 Cir. 1994), overruled on other grounds by Sandin.

21       Here, plaintiff received a written misconduct report and was  
22 given the opportunity to appear before a hearing several days after  
23 the charges were presented to him. The initial hearing was  
24 postponed when plaintiff requested an investigation, which included  
25 interviews with inmate witnesses identified by plaintiff and staff,  
26 and a review of documentary evidence. Plaintiff was exonerated of  
27 the charges following a hearing at the completion of the  
28 investigation. Plaintiff received all constitutionally required

1 procedural guarantees.

2 I recommend that defendants' summary judgment motion as to the  
3 due process claim, be granted.

4 CONCLUSION

5 Defendants' motion for summary judgment (#32) should be  
6 granted.

7 SCHEDULING ORDER

8 The above Findings and Recommendation will be referred to a  
9 United States District Judge for review. Objections, if any, are  
10 due February 10, 2009. If no objections are filed, review of the  
11 Findings and Recommendation will go under advisement on that date.

12 If objections are filed, a response to the objections is due  
13 February 24, 2009, and the review of the Findings and  
14 Recommendation will go under advisement on that date.

15 IT IS SO ORDERED.

16 Dated this 26th day of January, 2009.

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18  
19 /s/ Dennis James Hubel  
20 Dennis James Hubel  
United States Magistrate Judge  
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